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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 245

THE CITY OF GREENVILLE, ETC., ET AL., APPELLANTS,

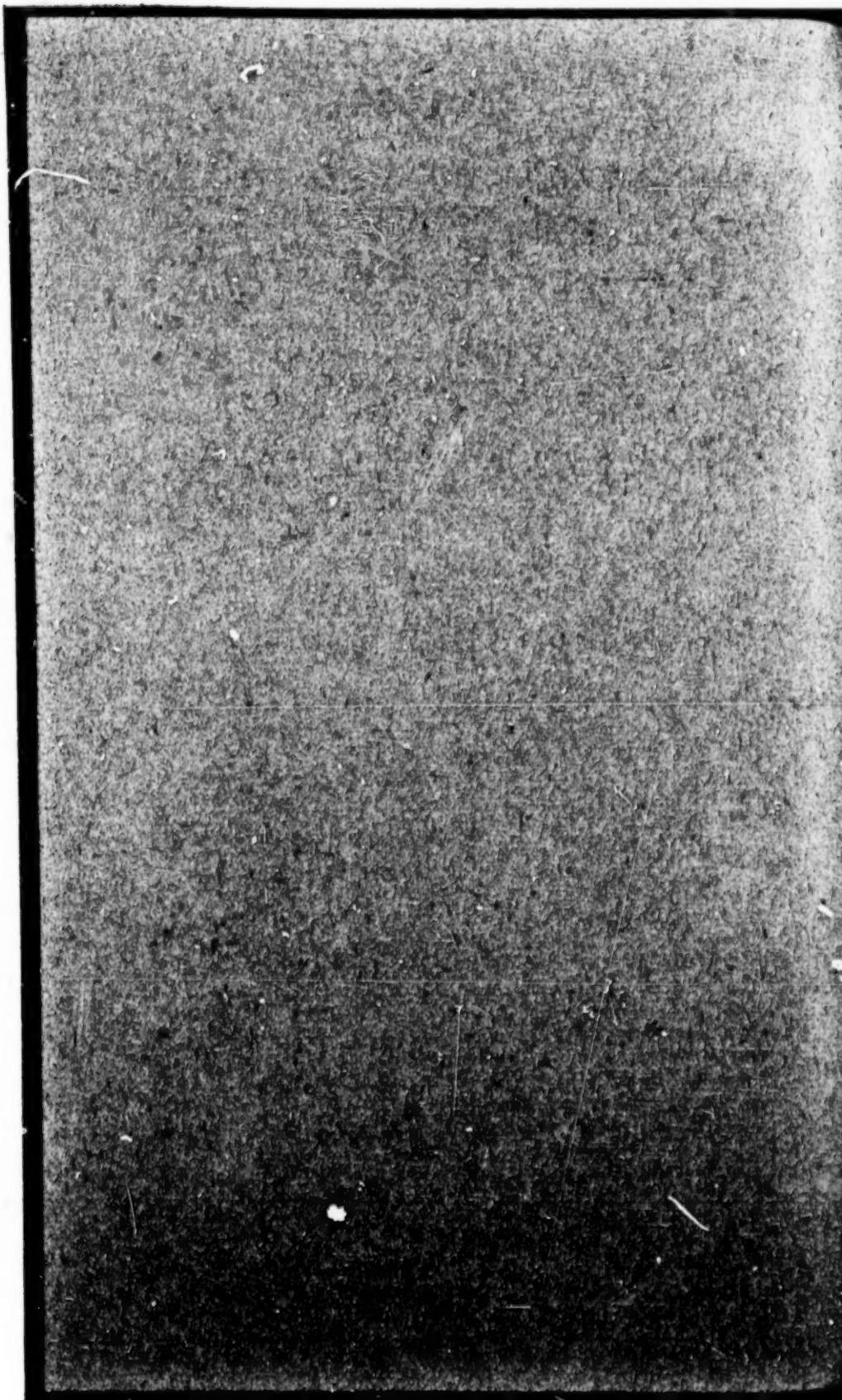
vs.

W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF SOUTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

FILED JULY 20, 1931

(36,059)



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INDEX

	Original	Print
Proceedings in supreme court of South Carolina	1	1
Complaint	3	1
Summons (omitted in printing)	8	
Rule to show cause	8	4
Order modifying restraining order (omitted in printing)	9	
Petition for order making County of Sumter party plaintiff (omitted in printing)	10	
Order making County of Sumter party plaintiff (omitted in printing)	11	
Exhibit "A" to Complaint—An act to impose a license tax on gasoline, etc	13	5
Notice and demurrer	16	8
Agreed statement of facts	17	9
Opinion, Cosgrove, J., and judgment	19	10
Dissenting opinion, Cothran, J	23	16
Petition for appeal and supersedeas	24	16
Order allowing appeal, etc	26	17
Assignments of error	28	18
Notice of appeal	33	22
Bond on appeal (omitted in printing)	35	
Citation and service (omitted in printing)	38	
Precipe for transcript of record	40	23
Clerk's certificate (omitted in printing)	42	
Statement of points to be relied upon and designation of parts of record to be printed	43	24

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[fols. 1 & 2]

IN SUPREME COURT OF SOUTH CAROLINA

In the Original Jurisdiction

THE CITY OF GREENVILLE, a Municipal Corporation under the Laws of the State of South Carolina; the City of Sumter, a Municipal Corporation under the Laws of the State of South Carolina; the City of Florence, a Municipal Corporation under the Laws of South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, Plaintiffs,

against

W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, Constituting the State Tax Commission of the State of South Carolina, Defendants

[fol. 3] COMPLAINT—June 27, 1930

The plaintiffs above named, complaining of the defendants, allege:

1st. That at all times herein mentioned the plaintiffs, the cities of Greenville, Sumter, and Florence, and the County of Sumter, were, and still are, municipal corporations duly created and existing under and by virtue of the laws of the State of South Carolina, and as such they bring this action in their own behalf and in behalf of all other municipalities, and counties within the State of South Carolina in like situation which may come in and contribute to the expense hereof.

2nd. That the defendants, W. G. Query, J. P. Derham and Frank C. Robinson are the duly elected, qualified and acting members of the State Tax Commission of the State of South Carolina, and as such are the proper persons against whom this action should be brought.

3rd. That the General Assembly of the State of South Carolina at its 1930 session passed an Act entitled "An act to impose a license tax on gasoline, substitutes there-

for, or combinations therefor, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax," which said act was approved by the Governor of the State of South Carolina on the 4th [fol. 4] day of April, 1930, a copy of said Act being hereto attached and made a part hereof as Exhibit "A".

4th. That the plaintiffs above named, and, as they are informed and believe, others in like situation, have for some time prior to the passage of the said Act, purchased gasoline and motor fuels without the State of South Carolina in tank car lots and have imported the same within this State and have stored thereafter, used and consumed the said gasoline and motor fuels for public purposes in connection with the discharge of the functions devolving upon them as municipal corporations under the laws of the State of South Carolina, and that the said municipalities have not been engaged in the handling of gasoline as a business or occupation, have not derived any revenue therefrom, the said gasoline being purchased, imported, stored and used solely for municipal purposes as aforesaid.

5th. That under the terms of the Act hereinbefore referred to, if the said Act be constitutional, the plaintiffs, and all others in like situations, will be compelled to pay a tax purporting to be a license tax upon the storage and use of said gasoline for strictly municipal purposes.

6th. The plaintiffs allege that the said Act approved the 4th day of April, 1930, is contrary to the provisions of the Constitution of the United States and of the State of South Carolina and should be declared null and void, in that

(a) The said Act, insofar as it undertakes to levy a tax on property of the plaintiffs and other municipalities and political subdivisions in the State of South Carolina, violates Section 4 of Article 10 of the Constitution of South [fol. 5] Carolina, whereby the property of counties and municipalities used exclusively for public purposes and not for revenue is exempt from taxation.

(b) That the General Assembly of the State of South Carolina is limited in its taxing power by the provisions

contained in Section 1 of Article 10 of the Constitution of South Carolina to the imposition of a tax upon property, a capitation tax upon domestic animals, a graduated tax on incomes and a graduated license on occupations and business, and that the tax undertaken to be imposed by the terms of the said Act approved April 4, 1930, purports to be a license tax, but that the said tax is not applicable to the storage and consumption of gasoline and motor fuels by municipalities for public purposes and not for revenue, in that the said storage and consumption thereof for such purposes does not constitute an occupation or a business.

(c) That the said tax is in violation of the provisions of Section 1, Article 10 of the Constitution of the South of South Carolina, in that it does not provide for a uniform and equal rate of assessment and taxation, in that it permits gasoline to be imported and used without taxation, provided the same can be used within 24 hours after such shipment loses its interstate character, and that it is likewise discriminatory, in that it exempts from the operation thereof gasoline which is imported and stored for resale.

(d) That the said Act approved April 4, 1930, is violative of subdivision 3 of Section 8 of Article 1 of the Constitution of the United States, in that there is thereby dele- [fol. 6] gated to the Congress of the United States the power to regulate commerce between the several states, and the Act approved April 4, 1930, is an attempt on the part of the State of South Carolina to regulate such interstate commerce and to impose a burden thereupon.

7th. The plaintiffs allege that they have no adequate remedy at law, in that no provision is made in said Act for the recovery of any tax illegally charged and collected, and in that the several municipalities and counties affected would in any event be driven to a multiplicity of suits, and plaintiffs further allege that this action is properly maintainable in the original equity jurisdiction of this Honorable Court, in that a matter of general public interest *in* involved, affecting municipalities and counties of this State, and for the reason that an emergency exists, in that the tax imposed by the Act in question is due and payable monthly, that some of said taxes have already accrued and that the de-

fendant may at any time proceed to undertake to enforce the collection thereof and that this Court should exercise its jurisdiction to restrain the imposition and collection of said tax.

Wherefore plaintiffs pray:

1st. That a Rule may issue requiring the defendants to show cause why they should not be restrained and enjoined from enforcing the collection of the tax as against these plaintiffs during the pendency of this action, and

2nd. That a Rule may issue requiring the defendants, constituting the State Tax Commission of South Carolina, to show cause why they should not be permanently restrained and enjoined from enforcing the provisions of the Act approved April 4, 1930, and

[fol. 7] 3rd. That the said Act, insofar as it applies to municipalities, counties, or political subdivisions of the State of South Carolina, *de* declared unconstitutional, null and void.

B. A. Morgan, Attorney for the City of Greenville, South Carolina. Shepard K. Nash, Attorney for the City and County of Sumter, South Carolina. J. M. Lynch, Attorney for the City of Florence, South Carolina.

Duly sworn to by A. C. Mann. Jurat omitted in printing.

[fol. 8] In Supreme Court of South Carolina

Rule to Show Cause—July 3, 1930

Upon considering the verified petition of the plaintiff, herein, and it appearing to the Court that public interests are involved in this proceeding, and that this case should be determined by the Court in its original jurisdiction,

It is ordered, That W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina, in open court at Columbia, S. C., on the first day of the term next after the expiration of the time fixed in the summons, at 10:00 A. M., or as soon

thereafter as suits the convenience of the Court for the hearing of the issues in this proceeding, do show cause [fols. 9-12] before the Supreme Court of South Carolina, if any they can why the prayer of the complaint should not be granted, and why the defendants W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina, should not be enjoined from carrying out the provisions of an Act entitled "An Act to impose a license tax on gasoline, substitutes therefor, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax," which said Act was approved by the Governor of the State of South Carolina on the 4th day of April, 1930, and that they shall show warrant, if any they can, for executing the provisions of said Act under the constitution and laws of the State of South Carolina. That, in the meantime, the defendants be and are hereby restrained from enforcing said Act.

It is further ordered, that a copy of the summons and complaint, and Rule to Show Cause be forthwith served on the defendants, and that a copy of the return be served upon the attorneys for the plaintiff, herein, within the time fixed in the summons in this cause for making answer to the complaint.

T. P. Cothran, Associate Justice.

[fol. 13] EXHIBIT "A" TO COMPLAINT

An Act to impose a license tax on gasoline, substitutes therefor, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax

Section 1. Be it enacted by the General Assembly of the State of South Carolina: Every person, firm corporation, municipality, County, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive

by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, county or subdivisions thereof, and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by acts of the General Assembly of the State of South Carolina, the same being Act, No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products or petroleum; Provided, That this Act shall not impose a tax upon crude petroleum, residium or smudge oil, Provided, further, That one percent to cover loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act.

Section 2. The license tax imposed by this act shall be paid on or before the 20th day of each month and every [fol. 14] month, as hereinafter provided. That every person, firm, corporation, municipality, county or any subdivision thereof subject to the payment of the tax herein provided shall on or before the 20th day of each month and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combination thereof or substitutes therefor, which have been received, kept, stored or used within this State during the previous month and shall at the same time remit to the South Carolina Tax Commission the amount of the tax im-

posed by this Act. Every one liable for the payment of this tax shall keep a record, or records, showing all receipts of all gasoline, combination thereof or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industries.

Section 3. If the tax imposed in this Act is not paid to the South Carolina Tax Commission on or before the 25th day of each and every month the tax Commission shall issue a warrant or execution directed to the Sheriff of the County or the tax collector in which the delinquent taxpayer resides or where such business is conducted, and the Sheriff or tax collector to whom this execution is directed shall proceed to enforce the same in the same manner provided by law for the enforcement of an execution issued by the County Treasurer against a delinquent taxpayer. The taxes and all penalties herein provided shall be held as a debt payable to the State by the taxpayer against whom the same shall be charged, and all such taxes and penalties shall be a first lien in all cases whatsoever upon all property of the taxpayer charged therewith.

Section 4. If any taxpayer liable for the payment of the tax herein imposed shall fail to make the required monthly returns or shall fail to pay the taxes herein provided the South Carolina Tax Commission shall make a return for such delinquent taxpayer upon such information as may be reasonably obtained, assess the tax thereon, add a penalty of ten percent to the amount as assessed and proceed to collect the tax and penalties as provided for in Section 3 of this Act.

Section 5. Every taxpayer liable for the payment of the tax herein imposed by this Act shall report to the South Carolina Tax Commission within five (5) days after the [fol. 15] date this Act goes into effect, a true statement of all gasoline, combinations thereof, or substitutes therefor, which such taxpayer has had on hand at the close of the day this Act shall go into effect.

Section 6. Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or

retailer, selling, consigning, shipping, distributing or using gasoline, combinations, thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce.

Section 7. The Commission of Agriculture, Commerce and Industries shall, at such times and in such form as may be specified by the South Carolina Tax Commission certify to the South Carolina Tax Commission the same information regarding shipment of gasoline to taxpayers liable for the payment of the tax imposed in this Act as is done under the provisions of Act No. 34, Acts of 1925, and Act No. 102, Acts of 1929.

Section 8. The tax imposed in this Act shall be distributed in the same manner and proportion as is the tax imposed by Act No. 102, Acts of 1929. Nothing in this Act shall be construed so as to apply to crude oil, fuel oil or kerosene oil.

Section 9. If any clause, sentence, section or provision of this Act shall be held unconstitutional such invalidity shall not effect or impair the remaining portion of this Act.

Section 10. This Act shall take effect immediately upon its approval by the Governor.

Approved April 4th, 1930.

[fol. 16] In Supreme Court of South Carolina

[Title omitted]

Notice and Demurrer

To Messrs. B. A. Morgan, Shepard K. Nash, and J. M. Lynch, attorneys for plaintiffs:

You will please take notice that upon the call of this case for trial, defendants will interpose the following demurrer to the complaint:

The defendants above named demur to the complaint herein upon the ground that it fails to state facts sufficient to constitute a cause of action;

In that it appears that the taxes sought to be collected by defendants in the discharge of their official duties are imposed by the terms of an Act approved April 4th, 1930, and that no part of said Act violates the clauses of the Constitution of the United States, nor of the State of South Carolina, as alleged in the complaint.

John M. Daniel, Attorney General for S. C. J. Fraser Lyon, General Counsel for Defendants.

I hereby certify that the above demurrer is meritorious and not interposed merely for delay.

J. Fraser Lyon, J. Fraser Lyon.

[fol. 17] In Supreme Court of South Carolina

[Title omitted]

Agreed Statement of Facts

In addition to the allegations contained in the complaint, the following facts are agreed to:

That much gasoline is manufactured by the Standard Oil Company at its refinery in Charleston, in the State of South Carolina, which said gasoline is stored for future use in the State of South Carolina, and much gasoline is brought into the State by the Oil Companies for re-sale and is actually stored within this State for future use for more than twenty-four hours before it is sold or used, and none of this gasoline is taxed for its importation and/or storage in this State, but is taxed under the "Gasoline Business License Act" when it is used in this State by such Oil Company, or when sold in less than tank car lots by such oil companies.

That such gasoline as is manufactured at the refinery of the Standard Oil Company in Charleston, S. C., as is shipped to other States than South Carolina, is not taxed in South Carolina.

Also under the provisions of the law, when any Oil Com-
[fol. 18] pany sells a tank car lot of gasoline to a dealer in

South Carolina, the dealer pays the tax on such gasoline as it is consumed and as it is resold.

James M. Lynch, Florence, S. C.; B. A. Morgan, Greenville, S. C.; Shepard K. Nash, Sumter, S. C., Plaintiffs' Attorneys. J. Fraser Lyon, Columbia, S. C., Defendant's Attorney.

[fol. 19] In Supreme Court of South Carolina

In the Original Jurisdiction

Case No. 955

The City of Greenville, a Municipal Corporation, et al., Plaintiffs,

v.

W. G. Query et al., Constituting the State Tax Commission of the State of South Carolina, Defendants

Complaint Dismissed and Injunction Dissolved

James M. Lynch, of Florence; Shepard K. Nash, of Sumter, and B. A. Morgan, of Greenville, for plaintiffs.
J. Fraser Lyon, of Columbia, for defendants.

Opinion No. 13117—Filed April 13, 1931

John I. Cosgrove, A. A. J.:

By this action in the original jurisdiction of the Court, the Cities of Greenville, Sumter and Florence (the County of Sumter later intervening) seek to enjoin the enforcement of the Act of the General Assembly (Act No. 833) Approved 4th April, 1930, popularly termed the Gasoline Tax Act of 1930, praying that said Act "insofar as it applies to municipalities, counties, or political subdivisions of the State of South Carolina, be declared unconstitutional, null and void".

The complaint alleges, in substance, that plaintiffs and others in like plight for some time prior to the passage of this Act purchased gasoline and motor fuels without the State of South Carolina and imported the same in tank car lots, and have stored, used and consumed such imported

gasoline and motor fuels "for public purposes in connection with the discharge of the functions devolving upon them as municipal corporations under the laws of the State of South Carolina"; and, in addition, that they are not engaged in the handling of gasoline as a business or occupation and have derived no revenue therefrom, the gasoline so imported being stored and used solely for municipal purposes; and further, that if the Act is upheld, plaintiffs will be compelled to pay a tax upon the storage and use of gasoline for strictly municipal purposes.

They assail the Act as violative of both the Federal and State Constitutions.

It is asserted that the Act is unconstitutional under the Federal Constitution because it attempts to regulate interstate commerce and to impose a burden thereupon.

Under the State Constitution, its invalidity is urged under three heads: (1) That the tax is not such a tax as the General Assembly has the power to impose, in that, (a) It is a license tax imposed on a business or occupation, and as such cannot be made applicable to municipal corporations storing and using gasoline for governmental pur- [fol. 20] poses, (b) It is a tax on the mere ownership of property and the alleged inherent right to use the same free from governmental interference; (2) The tax is not uniform and equal; and (3) The Act attempts to levy a tax on the property of municipalities and counties contrary to Section 4, Article X, of the Constitution.

All of the objections to this statute above presented (with the exception of ground (3) were fully considered and decided against plaintiff's contentions in Gregg Dyeing Company v. Query et al., the opinion in which will be filed herewith.

There remains, then, for consideration in this cause only the objection that the Act is violative of the Constitution, Section 4, Article X, in that it imposes a tax on the property of a municipality or county, exempt by law.

Section 4, Article X, of the Constitution provides:

"There shall be exempt from taxation all county, township, and municipal property used exclusively for public purposes."

Plaintiffs claim that property of political subdivisions, used for public purposes, are exempt from all duties or

taxes of whatever nature or description; that the policy of this State is for a liberal construction of the exemption from taxation allowed municipal corporations; and that the Act taxes instrumentalities of government and impedes and burdens the exercise of governmental functions.

It is true that in the absence of express declaration by the Legislature, there is a presumption, generally, against the intention of the legislative body to tax an instrumentality of state government or a state agency; and that where an exemption from taxation of its property is claimed by such instrumentality or agency, a liberal construction of the exemption will be allowed by this Court (State v. Columbia, 115 S. C. 108; 104 S. E. 337). But in the instant case, the taxing body of South Carolina has expressly and clearly enacted that all municipalities, counties and political subdivisions shall pay this tax. Rules of presumption and policy, therefore, disappear in the light of expressed legislative declaration.

We have just held in the Gregg case, supra, that this tax is not a tax on property at all; but that it is an excise imposed on the storage of gasoline in South Carolina for use and consumption in this State. Does, then, the Constitutional exemption claimed by plaintiffs, as municipal corporations, extend to excise taxes as well as property taxes?

In South Carolina, taxes generally may be grouped into two classes; ad valorem taxes on property and taxes on privileges, excises, licenses, franchises and other classifications of like kind.

A study of Article X of our Constitution, entitled "Taxation and Finance", convinces us that the framers of that instrument in this Article were dealing solely with ad valorem taxes on property. (See Gregg Dyeing Co. v. Query et al., supra; City of Louisville v. Cromwell, (Ky.) 27 S. W. (2nd) 377.)

As was pointed out in that case, and in other decisions of this Court, there is no inhibition in our Constitution on the power of the General Assembly to impose excise taxes. As the provisions of Article X deal only with ad valorem taxes on property (and, in addition, with license taxes on occupa-[fol. 21] tions and businesses, income taxes and others expressly thereon named), it would seem logically to follow that the exemptions provided for in that Article would apply only to the kinds of taxes therein dealt with and

regulated. As neither this provision of the Constitution, nor any other, in any way refer to excise taxes, we hold that the exemptions therein allowed cannot be claimed against such taxes. In this conclusion we are not without support from eminent authority.

In 26 R. C. L. p. 315, we find:

"An exemption from taxation applies primarily to the annual general property tax. Whether it is to be extended to other classes of taxes depends upon various circumstances. Thus it does not ordinarily apply to excises, especially to such as are not in lieu of property taxes but are imposed upon the enjoyment of a privilege."

Churches and similar institutions, likewise exempted under this Article, have been denied by this Court exemption from liability for street improvement assessments. (Wesley M. E. Church v. Columbia 105 S. C. 303).

In addition, our conclusion is sustained by an almost unanimous line of contemporaneous authorities upholding a tax of this character against like objections of municipal corporations and governmental subdivisions.

Crockett v. Salt Lake County (Utah), 270 Pac. 142; 60 A. L. R. 867.

Wright v. Fulton County (Ga.), 150 S. E. 262.

City of Louisville v. Cromwell (Ky.), 27 S. W. (2nd) 377.

City of West Palm Beach (Fla.), 130 So. 710.

City of Portland v. Kozer (Ore.), 217 Pac. 833.

People v. City and County of Denver (Colo.), 272 Pac. 629.

Plaintiffs cite and rely upon the case of O'Berry v. Mecklenburg County, 151 S. E. 880; 67 A. L. R. 1304, in which a like statute of North Carolina was held not to apply to counties of that state. In this case it is worthy of note that the tax in question was defined by the North Carolina Supreme Court to be an excise tax. That court, however, expressly refused to pass on the Constitutional question involved. Its decision was merely that the terms and provisions of the Act there under consideration were not broad enough to include a county, there being an absence of express declaration of intention so to do. It is, therefore, of no application in the instant case, in which our statute ex-

pressly imposes the tax on the municipal corporations affected.

The other case relied on by plaintiffs is Panhandle Oil Co. v. Miss. 277 U. S. 218, 72 L. Ed. 857. In this case, the Supreme Court of the United States held, in effect, that the sales tax on gasoline imposed by the Mississippi statute was a consumption tax paid by the consumer, and as such could not be assessed and collected on purchases of gasoline by the United States in the exercise of its constitutional powers. This conclusion was supported by a bare majority of one of that Court.

We, of course, are not bound by that decision on this point. We prefer, however, the view of Mr. Justice Holmes, who dissented from the conclusion of the majority that such a tax is a burden on the exercise of governmental functions and as tax on a governmental instrumentality. He said:

"I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, [fol. 22] the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. Metcalf v. Mitchell, 269 U. S. 514, 70 L. Ed. 384, 46 Sup. Ct. Rep. 172."

A like argument was satisfactorily disposed of in City of Louisville v. Cromwell, supra, in this language:

"Under the condition of the law as thus declared, it would seem superfluous to discuss the opinions of courts in other jurisdictions, either state or federal, since the law as declared in this jurisdiction leads inevitably to the conclusion that plaintiff is not entitled to the exemption it claims. If it were otherwise, then the city would be exempt from paying the tax levied by statute upon the filing of suits on amounts above $50, and would also be exempt from paying the appeal tax fee collected on appeals to this court. It would likewise be exempt from paying any inheritance,

legacy, or succession tax that might be levied in cases when some patriotic citzen should devise it property, and the same would be true as to the enhanced price put upon commodities by dealers therein in order to recoup the amount of occupational or excise taxes that they have been required to pay. The same logic urged in support of plaintiff's claimed exemption would also entitle it to claim exemption from paying the enhanced value of any article it might purchase in the discharge of its governmental function and which enhancement was because of general ad valorem taxes that the person or dealer from whom the purchase was made may have placed on the selling price, and the principle so contended for would thus produce, in the attempted enforcement of the exemption, such entangled and confused conditions as to be practically incapable of enforcement and which it might be well presumed that the Legislature never intended to create."

Again, from the same case:

"It also should not be overlooked that the involved tax is levied and collected solely by and for the benefit of the commonwealth and not by any municipality or other subdivision of the state. The proceeds go to make up the principal part of a fund to meet a supremely necessary purpose of modern creation, i. e., the construction and maintenance of roads of sufficient capacity to meet the requirements and necessities of modern vehicles of travel. The statute is so devised as to distribute the burden of contributing to that fund in the most equitable and just manner possible. The roads are built and maintained for the use of the vehicles that consume the gasoline. The larger and heavier ones consume more of the taxed product than the lighter ones, and the heavier the vehicle the more damage it does to the roads and the greater the necessity for their increased substantiality. So that every one contributes in proportion to his use of the roads and in proportion to the corresponding damage done to them by such use. Counties, municipalities and other taxing districts use them in the manner indicated the same as private individuals, and the involved tax is expended to enable the state to construct and maintain them for the use of such municipal authorities as much so as is done for the private citizen."

These gasoline taxes have been pledged to the payment of the principal and interest on bonds, the proceeds of which [fol. 23] were used and are being used in the construction and maintenance of the highways of this state. Millions of dollars of bonds have been issued and will be issued for these purposes. Good faith with the holders of these bonds would seem to require that no device should be countenanced which would permit evasion of the taxes so pledged, unless the Act imposing them is clearly unconstitutional beyond a reasonable doubt. We are not so convinced.

It is therefore ordered that the temporary injunction herein is dissolved, the prayer for a permanent injunction denied, and the complaint and intervening petition dismissed.

Blease, C. J.; Stabler and Carter, J. J., concur. Cothran, J., dissents.

In Supreme Court of South Carolina

Dissenting Opinion

Cothan, J. (dissenting):

For the reasons stated by me, dissenting in the case of Gregg Dyeing Company v. Query, et al., I think that the Act of 1930 is unconstitutional and that the injunction prayed for should be granted.

[fol. 24] In Supreme Court of South Carolina

[Title omitted]

Petition for Appeal and Supersedeas

To the Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

And now comes the City of Greenville, a Municipal Corporation under the Laws of the State of South Carolina, the City of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the City of Florence, a Municipal Corporation under the Laws of the State of

South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the plaintiffs and petitioners herein, by P. F. Henderson, B. A. Morgan, Shepard K. Nash and James M. Lynch, their attorneys, and feeling aggrieved by the opinion and order of this Court, entered on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction prayed for in plaintiffs and petitioners complaint herein, and in that said opinion and order granted a final judgment against these plaintiffs and hereby pray that an appeal may be allowed them from said opinion, decree and final order to the Supreme Court of the United States, and that the Clerk of the Supreme Court of South Carolina may be directed to prepare and certify a transcript of the records and proceedings in said cause to the [fol. 25] United States Supreme Court at Washington, D. C., in accordance with its rules and practice, and for the reasons specified and set out in the assignment of errors filed herewith, in order that the errors complained of in the said assignment of errors may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and that all further proceedings herein after the allowance of said appeal be transferred to said Supreme Court of the United States of America.

Petitioners further pray that an order of supersedeas may be granted herein pending the final disposition of the cause, and that the amount of the security therefor, and for costs, be fixed by the order allowing this appeal.

The City of Greenville, the City of Sumter, the County of Sumter, the City of Florence, by P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Their Counsel.

[fol. 26] In Supreme Court of South Carolina

[Title omitted]

Order Allowing Appeal and to Operate as Supersedeas—July 8, 1931

The plaintiffs and petitioners herein having prayed for the allowance of an appeal to the Supreme Court of the

United States from the decree made and the final judgment entered in said cause by the Supreme Court of the State of South Carolina on the 13th day of April, 1931, in so far as the same refused the issuance of an injunction against the defendants, and in so far as the same granted absolute judgment against the plaintiffs, all against the prayer of the plaintiffs in their complaint herein, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided, it is now hereby

Ordered

That an appeal be and the same is hereby allowed as prayed for to the Supreme Court of the United States in this cause, and as provided by law; and

It is further ordered that the Clerk of this Court shall prepare and certify a transcript of its record and proceeding, and decree and final order, in accordance with the stat-
[fol. 27] utes and rules of the Supreme Court of the United States, and transmit the same to the Clerk of the Supreme Court of the United States in Washington, D. C., so that he shall have the same in said Court within thirty days from this date; and

It is further ordered that this order operate as a supersedeas, and that the supersedeas bond be and the same is fixed in the sum of One Thousand ($1000.00) Dollars, and

It is further ordered that the security for costs be and the same is hereby fixed in the sum of Two Hundred fifty Dollars (-250.00).

Let said bond, which may be combined in the sum of Twelve hundred fifty ($1250.00) Dollars, be approved by the Clerk of this Court.

Eugene S. Blease, Chief Justice of Supreme Court of South Carolina.

[fol. 28] In Supreme Court of South Carolina

[Title omitted]

Assignment of Errors

And now come the City of Greenville, a Municipal Corporation under the Laws of the State of South Carolina, the City of Sumter, a Municipal Corporation under the Laws of

the State of South Carolina, the City of Florence, a Municipal Corporation under the Laws of the State of South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the plaintiffs and petitioners herein, through their counsel, and present this assignment of errors, and say that in the records and proceedings in the above entitled cause and the resultant decree and opinion of the Supreme Court of South Carolina made and entered against them on the 13th day of April, 1931, there is error in the particulars herein set out; that is to say:

1

That the Court erred in making the decree herein.

2

That the Court erred in holding that the Act of the General Assembly of the State of South Carolina approved April 4, 1930 (Acts of 1930, page 1390) hereinafter referred to as "The Gasoline Tax Act of 1930," is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution (Article 1) Section 3, Clause 3); and that the Court erred in not holding to the contrary, that the aforesaid Act is unconstitutional and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes [fol. 29] the interstate origin of the gasoline in question the basis of classification in the imposition of the tax.

3

That the Court erred in holding that the aforesaid Gasoline Tax Act of 1930 passed as aforesaid by the General Assembly of the State of South Carolina, is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution; and that the Court erred in not holding to the contrary, that said Act is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, inasmuch as it levies a tax on gasoline bought outright by plaintiffs before its shipment in Interstate Commerce and not thereafter resold within this State.

4

That the Court erred in holding that the socalled Gasoline Tax Act of 1930 enacted as aforesaid by the General Assembly of South Carolina, is not a license tax Act.

5

That the Court erred in not holding that the Act in question is a License Tax Act, and that as a License Tax Act it is unconstitutional and is repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Carolina and its importation in Interstate Commerce the joint acts which give rise to the license tax imposed; and that the Court further erred in not holding that a license tax cannot be laid in part upon Interstate Commerce.

6

That the Court erred in not holding that the aforesaid Gasoline Tax Act of 1930, enacted as aforesaid by the General Assembly of the State of South Carolina is repugnant to the Commerce Clause of the Federal Constitution in that it discriminates against gasoline produced by other States, and places the taxes levied only upon persons w[illegible]ad corporations which import in Interstate Commerce gasoline and store the same for twenty-four hours, it appearing [fol. 30] affirmatively amongst other things that gasoline is produced and manufactured within the State of South Carolina, which said gasoline manufactured and produced within the State of South Carolina and stored for future use and consumption in South Carolina is exempt from the tax imposed under the said Gasoline Tax Act of 1930.

7

That the Court erred in not holding that under the undisputed facts of this case, plaintiff was entitled to an injunction against the imposition and enforcement of the threatened tax, there being on adequate remedy at law, and the admitted facts showing that the respondents were threatening to tax gasoline which had been definitely bought in a sister State before its shipment and was not destined for resale, that such gasoline was a product of a sister State, and that such origin was made the basis of the classification for the purpose of such taxation.

8

That the Court erred in holding that in considering the constitutionality of the Act in question, that other Acts of

the General Assembly of said State may be considered in so doing, and that said other acts may supplement and complement the constitutionality of the Act in question, it being submitted to the contrary that the Act in question must stand or fall as to its constitutionality upon its own terms, and that certainly no other Act which is not included within its terms may be read into said Act for the purpose of testing its constitutionality.

9

That the Court erred in holding that the general policy of the State of South Carolina as to the taxation of gasoline as a whole may be considered in testing the constitutionality of the Act in question, and that the fact that there is another Act or Acts which places a tax of six cents per gallon upon all persons, firms or corporations engaging in the business of selling gasoline may be invoked in testing the constitutionality of the present Act, which does not purport to tax sales but which attempts to tax importation in Inter-
[fol. 31] state Commerce and storage alone.

10

That the Court erred in holding that the other Acts referred to in the Acts in question, to-wit: The Act of 1925 and the Act of 1929, purport to place a tax upon gasoline merely used within the State of South Carolina, and that the Standard Oil Company is legally forced and required to pay a gasoline tax within the State of South Carolina upon gasoline used by it in its fleet of trucks in said State; and that the payment of a uniform gasoline tax of six cents per gallon is by statute passed on to all users of gasoline within the State of South Carolina.

11

That the Court erred in holding that the Acts of the State of South Carolina, taken as a whole, reach and tax all gasoline consumed in the State, it being submitted that the Act in question expressly leaves free of taxation gasoline used within twenty-four hours after its importation, which may be a considerable quantity and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used but not sold, in South Carolina.

That the Court erred in holding that the Act in question, namely, the Gasoline Tax Act of 1930, is not a license tax, which erroneous holding was the basis of its holding that said Act was not repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that a license tax may be levied on "occupations and business alone"; it being submitted that the thing taxed herein was merely the owning and holding of one's own property which cannot be said to be either a business or an occupation, and that the Court erred in not holding the tax to be a license tax, and, therefore, repugnant to the aforesaid section of the State Constitution.

For which errors the plaintiffs, petitioners and appellants pray that the decree and opinion of the Supreme Court of South Carolina dated and filed the 13th day of [fol. 32] April, 1931, in the above entitled cause, be reversed, and that the cause be remanded with directions to said Court to grant the order of injunction sought; and for such other and further relief as may be proper in the premises.

P. F. Henderson, B. A. Morgan, Shephard K. Nash,
James M. Lynch, Appellants' Attorneys.

[fol. 33] In Supreme Court of South Carolina

[Title omitted]

Notice of Appeal, With Acceptance of Service

To W. G. Query, J. P. Derham, and Frank C. Robinson, personally and as members of South Carolina Tax Commission, or their Attorneys:

Please to take notice that the plaintiffs and petitioners in the above entitled suit have appealed and do appeal to the Supreme Court of the United States from the decree and final order and judgment entered and granted by the Supreme Court of South Carolina on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction sought by the plaintiffs or petitioners herein

and in so far as the same grants final judgment against the plaintiffs and in favor of the defendants herein.

Attached hereto are copies of the petition for appeal, order allowing appeal, assignment of errors, citation, and supersedeas and cost bond.

Dated this 8 day of July, 1931.

P. F. Henderson, B. H. Morgan, Shephard K. Nash, James M. Lynch, Attorneys for Appellees.

[fol. 34] Acceptance of Service

Service of the notice of appeal, with papers attached, as listed in the above entitled cause, is hereby accepted this 8th day of July, 1931, for and in behalf of the defendants and Appellees herein.

J. Fraser Lyon, Jno. M. Daniel, Atty. Gen., Their Counsel.

[fols. 35-37] Supersedeas bond on appeal for $1,250.00 approved; omitted in printing.

[fols. 38 & 39] Citation, in usual form, showing service on J. Fraser Lyon and Jno. M. Daniel, omitted in printing

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[fol. 40] In Supreme Court of South Carolina

[Title omitted]

Præcipe for Transcript of Record

The Clerk of the Supreme Court of South Carolina will please proceed to make up the transcript of record in the above entitled cause, including therein:

1. The whole of the printed transcript of record as used and submitted to the Supreme Court of South Carolina, the same being inclusive of the complaint for injunction on the part of the plaintiffs and petitioners, duly verified; the rule to show cause granted on July 3rd, 1930, by Honorable Thomas P. Cothran, Associate Justice, the order of Associate Justice Thomas P. Cothran, dated July 22nd, 1930,

the petition of the County of Sumter, and the order of Associate Justice Thomas P. Cothran, dated July 30th, 1930, the notice and demurrer on the part of the defendants and the agreement and stipulation between counsel.

2. The opinion and final judgment of the Supreme Court of South Carolina, filed on April 13th, 1931, together with the dissenting opinion by Associate Justice Cothran.

3. Petition for appeal and supersedeas, and order granting the same, filed July 8, 1931.

4. Assignment of errors and petition for reversal, filed with petition for appeal.

5. Notice of appeal with acceptance of service thereof. [fols. 41 & 42] 6. Supersedeas and cost bond, with approval thereof.

7. Citation with acceptance of service.

8. This præcipe.

9. Clerk's certificate.

P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Plaintiffs' and Appellants' Attorneys.

Due legal service of a copy of the foregoing præcipe is accepted this 8th day of July, 1931.

J. Fraser Lyon, Jno. M. Daniel, Atty. Gen., as Attorneys for Defendants, Appellees.

[fol. 42½] [Endorsed:] In the Supreme Court of South Carolina. Original jurisdiction. The City of Greenville et al., plaintiffs-appellants, vs. W. G. Query et al., Defendants-Appellants. Petition for appeal and supersedeas, order thereon, etc. Law offices James M. Lynch, Florence, S. C.

[fol. 43] In Supreme Court of the United States

Statement of Points to be Relied on and Designation of Parts of Record to be Printed—Filed July 20, 1931

Counsel for the plaintiffs in error or appellants herein designate as the points upon which they rely to reverse the judgment and final order of the Supreme Court of South Carolina which heard this cause, the points set out in the

assignment of errors, (in which the same are more fully set out, all of which being relied upon), to-wit:

That the Supreme Court of South Carolina erred in making the decree herein, and in holding that the so-called Gasoline Tax Act of the State of South Carolina, approved April 4, 1930, (Acts of 1930, page 1390) is constitutional, and is not repugnant to the Commerce Clause of the Federal Constitution, and in not holding to the contrary that said Act is unconstitutional, and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question the basis of classification in the imposition of the tax; and in that the Court erred in further holding that said Act is constitutional, and is not repugnant to said Commerce Clause of said Federal Constitution, and in not holding to the [fol. 44] contrary that the Act is unconstitutional and repugnant to said Commerce Clause of the said Federal Constitution inasmuch as it levies a tax on gasoline bought outright by plaintiffs before its shipment in interstate commerce and not thereafter resold within the State.

Further, in that said Court erred in holding that the Act in question is not a License Tax Act; and that said Court should have held that said Act was a License Tax Act, and as such is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline in question within the State of South Carolina and its importation in interstate commerce the joint acts which give rise to the License Tax imposed; and that the Court erred in not holding that a License Tax cannot be laid in part on interstate commerce.

That the Court further erred in not holding that the Act in question is repugnant to the Commerce Clause of the Federal Constitution in that it discriminates against gasoline produced by other States and places the Tax levied only upon persons and corporations which import in interstate commerce gasoline, and store the same for twenty-four hours, it affirmatively appearing among other things that gasoline is produced and manufactured within South Carolina, which gasoline is not reached by the Act in question.

That the Court further erred in not holding that the plaintiffs were entitled to an injunction, there being no adequate remedy at law open to the plaintiffs, and that the respond-

ents were threatening to collect a tax upon said gasoline brought in under the circumstances appearing in the admitted state of facts; and that the Court erred in considering and holding that upon passing upon the constitutionality of the Act in question that other Acts of the General Assembly of said State may be considered in so doing, and that the other Acts may supplement and complement the constitutionality of the Act in question. And that the terms [fol. 45] of other Acts may be invoked in testing the constitutionality of the Act referred to, although said other Acts levy a tax only upon sales of gasoline and do not attempt to tax importation in interstate commerce and storage alone.

That the Supreme Court of South Carolina further erred in holding that the Acts of 1925 and 1929, referred to by them, purport to place a tax upon gasoline merely used within the State of South Carolina, and in holding that the Standard Oil Company is legally forced and required to pay a gasoline tax in South Carolina upon gasoline used in its fleet of trucks in said State, and that the payment of a uniform gasoline tax of six cents per gallon is by Statute passed on to all users of gasoline within the State of South Carolina; and in holding that the Statutes of the State of South Carolina place a tax on all gasoline consumed in the State.

That the Supreme Court of South Carolina further erred in holding that the Act in question is not a License Tax Act, and based upon said erroneous holding in failing to hold that said Act is unconstitutional under Section One, Article Ten of the Constitution of the State of South Carolina, which provides that a License Tax may be levied on "occupations and businesses alone" it appearing affirmatively that the plaintiffs were not operating a storage business, but were only holding their own property until they could use it.

And Appellants designate as the parts of the record which they think necessary for the consideration of this appeal the transcript of record before the Supreme Court of South Carolina, comprising the petition of complaint for injunction, duly verified, the rule to show cause executed by a Justice of the Supreme Court of South Carolina, the notice and demurrer on the part of the defendant, the stipulation or agreement of counsel therein incorporated, and the decision [fols. 46 & 47] and final judgment of the Supreme Court of

South Carolina, rendered and filed on April 13, 1931, the petition for appeal and supersedeas and order granting the same, the assignment of errors and petition for reversal with petition for appeal, the notice of appeal, the supersedeas and cost bond with approval thereof, the citation, the præcipe, this designation of points relied on for reversal, and designation of parts of the record to be printed, together with acceptance of service on all of said papers and the Clerk's Certificate.

P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Appellants' Attorneys.

Due legal service of a copy of the foregoing designation of points relied on for reversal, and all parts of record necessary to the consideration of the appeal, is hereby accepted.

John M. Daniel, Atty. Gen., J. Fraser Lyons, Appellees' Attorneys.

[fol. 48] [File endorsement omitted.]

Endorsed on cover: File No. 36,059. South Carolina Supreme Court. Term No. 245. The City of Greenville, etc., et al., appellants, vs. W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina. Filed July 20, 1931. File No. 36,059.